"*VOETSTOOTS*" – BUYER BEWARE!

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The "*voetstoots*" clause is familiar to most of us. This is a standard clause in a sale agreement which protects the Seller by stating that the property, whether movable or immovable, is purchased "as is". This clause therefore seeks to deprive the Buyer of any recourse against the Seller should the property have latent or patent defects. A latent defect is one which could not have been discovered by a reasonably thorough inspection prior to sale, while a patent defect is visible on inspection.

The Consumer Protection Act, 2008 ("CPA") (and the restrictions it places on *voetstoots* clauses) is only applicable to immovable property sale transactions where the Seller sells the immovable property in the ordinary course of the Seller's business, and to the marketing service provided by the agent in negotiating between the Seller and Buyer. Where the CPA does apply, a Seller will find it difficult to rely on a *voetstoots* clause.

The CPA does not apply to "once-off" transactions such as the sale by an individual of his/her home. The *voetstoots* clause is therefore still applicable to the vast majority of property transactions. Where the CPA does not apply, patent defects will always be covered by a *voetstoots* clause, as will latent defects of which the Seller was not aware. In order for a Buyer to succeed in circumventing the *voetstoots* clause and holding a Seller liable for a latent defect, the Buyer will have to show that the Seller:

- knew of the latent defect and did not disclose it; and
- deliberately concealed it with the intention to defraud.

In the matter of *Odendaal v Ferraris 2008 ZASCA 85* the Supreme Court of Appeal ("SCA") found that the Seller's failure to obtain statutory approval for building alterations on the property constituted a latent defect but did not render the property unfit for its purpose. The SCA further held that where a Seller does not wilfully conceal a latent defect he/she is entitled to rely on the provisions of the *voetstoots* clause. A similar result was arrived at in the later High Court matter of *Haviside v Heydricks and Another 2014 (1) SA 235 (KZP)*.

The circumstances of each matter are extremely subjective as can be seen in the earlier decision of *Ornelas v Andrews Café and Another 1980 (1) SA 378 (W)* where a café and restaurant business was sold as a going concern. It emerged that the business did not have a license, and therefore the *voetstoots* clause did not protect the Sellers as they had a duty to deliver a business that could lawfully be conducted. This case can be differentiated from the *Odendaal* and *Haviside* matters on the facts.

Given the strength of the *voetstoots* clause, the high onus of proof on the Buyer, and the subjective nature of the evidence that would have to be led in circumventing this clause, it is critical that all Buyers inspect their prospective immovable property with a high degree of care and diligence, even to the point of obtaining a home inspection report or other expert reports so that a purchase can be made with complete clarity on what constitutes "as is".

Failing to properly consider the application of a *voetstoots* clause to your transaction could be very problematic and expensive.

For professional but personal advice on, and assistance with "voetstoots" related matters please contact Stuart Fourie (stuart@fouriestott.co.za), Vicky Stott (vicky@fouriestott.co.za), Chris Salmon (chris@fouriestott.co.za), or Allison Schoeman (allison@fouriestott.co.za) or visit our website for further information about our firm and areas of expertise.

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